



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

August 16, 2019
SPR19/1545

Christine M. Wilda
Associate Chancellor for Compliance
UMASS Amherst
340 Whitmore Building
Amherst, MA 01003

Dear Ms. Wilda:

I have received the petition of Ava Sasani appealing the response of the University of Massachusetts Amherst (UMass) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Ms. Sasani requested various records between UMass and Raytheon between January 1, 2014 and June 25, 2019. UMass responded on July 17, 2019.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

Appeal

In its July 17th response UMass indicates it is withholding certain records under Exemptions (a) and (u) of the Public Records Law. G. L. c. 4, § 7(26)(a), (u); G. L. c. 93 § 42. You also provided a fee estimate for the production of other records.

Exemption (a)

Exemption (a), known as the statutory exemption, permits the withholding of records that are:

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. See Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

UMass indicates it is withholding records "... pursuant to exemption (a), as G.L. c. 93 §42 prohibits disclosure of trade secrets without the trade secret owner's express consent. Pursuant to G.L. c. 93 §§42-42G, disclosure of trade secrets without consent constitutes misappropriation (as defined in G.L. c. 93 §42(2))."

Exemption (u)

Exemption (u) permits the withholding of:

trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns

G. L. c. 4, § 7(26)(u).

With respect to Exemption (u), you indicate "... portions of the records that contain scopes of work and licensing terms must be redacted pursuant to G.L. c. 4 §7 cl. 26(u). Exemption (u) permits the University to withhold 'trade secrets or proprietary information

provided to the University by research sponsors [...] This information must be redacted pursuant to exemption (u) because it constitutes trade secrets and/or proprietary information provided to the University by a research sponsor. . . .”

Burden of specificity

Pursuant to the Public Records Law, the burden shall be upon the records custodian to establish the applicability of an exemption. G. L. c. 66, § 10(b)(iv) (written response must “identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based . . .”); see also Globe Newspaper Co. v. Police Comm’r, 419 Mass. 852, 857 (1995); Flatley, 419 Mass. at 511.

UMass did not identify which specific records, categories of records or portions of records that it intends to withhold from disclosure. To deny access to a record under the Public Records Law, a records access officer must identify the record, categories of records, or portions of the record it intends to withhold. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3)(c)(4). Therefore, UMass must identify the record(s) it has in its possession that it is withholding.

Fee estimate

An agency may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents (\$.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Agencies may not assess a fee for the first 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested. G. L. c. 66, § 10(d)(ii). Where appropriate, agencies may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee shall not be more than \$25 per hour. Id. A fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv). See G. L. c. 66, § 10(d)(ii); 950 C.M.R. 32.06(4).

UMass asserts “[w]e will be producing the remaining records which are not exempt under [E]xemptions (a) and (u), but will not be able to produce them [] within the ten business day timeframe due to the amount of time it will take to search and review the records for possible exemption or redaction. A preliminary search has revealed approximately 92 records to be reviewed. We therefore require additional time to produce the records sought.” UMass also provides a fee estimate for the production of these records; specifically you estimate 5 hours of search time and 87 hours to segregate/redact the records.

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Based on UMass' fee estimate, it is unclear why it requires 5 hours of search time and 87 hours of segregation/redaction time. Particularly, it is unclear the number of records UMass seeks to segregate and/or redact and the number of pages at issue. It is additionally uncertain how many minutes per page UMass requires to review the responsive records. UMass must clarify these issues.

Further, as described above, a fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv). It does not appear that UMass submitted a petition to this office under G. L. c. 66, § 10(d)(iv); therefore, UMass must explain if such segregation and/or redaction is required by law.

Conclusion

Accordingly, UMass is ordered to provide Ms. Sasani with a response to the request, provided in a manner consistent with this order, the Public Records Law, and its Regulations within 10 business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Ava Sasani